Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78-724

WILLARD S. WALKER,

Petitioner,

v.

JOHN O. HOFFMAN, RUSSELL B. HALLIDAY, DALE L. FARLEY, MERLE HOFFERBER, W. P. RONAYNE, EDWARD LEWIS, JR., and DOES I through X,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In The

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In this case of denial of civil rights, and Fifth Amendment rights of "Due Process", your petitioner prays that a Writ of Certiorari issue to review the opinion affirming summary judgment which granted immunity to employees of the United States Forest Service, Department of Agriculture, from plaintiff's suit for damages.

OPINIONS BELOW

The opinions below have not been reported. The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit, affirming the District Court's grant of summary judgment for the respondents, is set out in the appendix A-1.[1/] The opinions of the Magistrate and of the District Court for the District of Oregon are set out at A-7 and A-12.

1/ Respondents have presented to the Court of Appeals an emergency motion requesting publication of the Court of Appeals decision. They urge that it sets an important precedent defining "the application of the qualified immunity principle to official actions taken in the administration of the public lands and with regard to trespassing individuals and structures placed on the public lands by them." The respondents wish to assert this decision as a precedent in other pending litigation concerning unauthorized, arbitrary action by Forest Service personnel.

This is the first decision in the Ninth Circuit (or any other circuit) which would permit employees of the Department of Agriculture to enlarge the scope of their official conduct beyond any statutory authority ever granted to them by Congress and would endorse seizure by such officials of power to dispense with any adjudicatory proceeding and to decide for themselves the extent and the validity of a citizen's unpatented mining claim located on public lands of the United States open to mineral entry, in disregard of Constitutional guarantees of a citizens' property and right to "Due Process".

JURISDICTION

The judgment of the Court of Appeals was made and entered June 23, 1978, and the order denying appellant's Petition for Rehearing was entered September 14, 1978. This petition for writ of certiorari is timely filed.

Jurisdiction to review by writ of certiorati is conferred on this Court by 28 USC §1254(1).

QUESTION PRESENTED

The question presented for review is whether it was erroneous to grant immunity in an action based on denial of civil rights and denial of "Due Process" brought against Forest Service personnel by a citizen on whose uncontested placer mining claim they have burned buildings and confiscated and sold personal property, when so doing was outside the scope of any statutory authority conferred upon Forest Service personnel.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS IN PERTINTENT PART

U.S. Constitution: "Due Process" and protection of property rights under the Fifth Amendment are so well known to the Court that the amendment need not be set forth.

Statutes: 16 USC §482 (codified 1970), known as the Organic Administration Act of 1897, creating the national forest system, provides that nothing therein shall interfere with the operation of the mining law.

"Any mineral lands in any national forest...subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions contained in Sections 473-482 and 551 of this Act." 16 USC §482.

The mining law provides:
30 USC §22 "...all valuable mineral deposits in lands belonging to the United States...shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States...."

30 USC §35 "Claims usually called 'placers', including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims...."

30 USC §612 "Unpatented mining claims - Prospecting, mining or processing operations...Reservations in the United States to use of the surface and surface resources.

(b)...any use of the surface of any such claim by the United States...shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto....

(c) Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith... no claimant of any mining claim... shall, prior to issuance of patent therefor, sever,remove, or use any vegetative or other surface resources thereof which are subject to management or disposition by the United States..."

The Administrative Procedure Act provides in 5 USC §558(b): "A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law."

REGULATIONS

The Forest Service regulations disclaim any intention to interfere with use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws. "It is not the purpose of these regulations to provide for the management of mineral resources; the responsibility for managing such resources is in the Secretary of the Interior." 36 CFR §252.1.

The Regulations of the Department of the Interior provide:

"The Government may initiate, contests for any cause affecting the legality or validity of any entry or settlement or mining claim." 43 C.F.R. §4.451-1.

STATEMENT OF THE CASE

In 1971, Willard Walker located a placer mining claim based on discovery of placer gold. The land was open to mineral entry, available to be located by any citizen under the mining law. 30 USC §22 et seq. The mining law authorizes plaintiff to maintain structures and equipment and personal property on a currently existing mining claim. 30 USC §612.

No contest was ever filed to challenge the legality or the validity of Walker's Mamie Placer Claim. Nor was any action instituted in any court to dispute Walker's right to occupy the placer claim. In the absence of such adjudicatory procedure, no employee of the Department of Agriculture has any legally delegated authority to determine the extent or the legality or the validity of an unpatented mining claim located on federal public lands open to mineral entry, nor to treat structures or personal property maintained on a mining claim as being in trespass.

Intra-agency correspondence in the administrative file shows that the defendants were aware that the contest which had invalidated the old mineral entry of R. H. Barney on the Mamie lode claim located September 1, 1958, would not affect Walker's right to maintain structures on his placer mining claim entry made in July 1971. Thomas E. Atwood, Resource Assistant for Forestry, wrote on November 12, 1973 to W. P. Ronayne, Forest Supervisor:

> "It has come to our attention that the above named individual [Willard Walker] has filed a placer claim over the area of the Mamie lode claim. This being the case, it would appear that we have been frustrated in our present attempts to resolve this occupancy trespass. In light of this development we have not proceeded with the impoundment of personal property.
>
> "We would like to recommend proceeding as a validity contest..." R 100.

Dale L. Farley, Lands & Recreation Staff, forwarded Atwood's letter to the Regional Forest R-6, with a request for mineral examination, and wrote:

> "If the new examination and report supports an additional complaint, this we so recommend."

He observed that there was no basis for withdrawal of the land. R 101.

Colver Anderson, mining engineer, recommended a validity hearing. He observed: "In that event, Mr. Walker will offered a chance to show his discovery before we take other action." R 103. Anderson's report shows the structures covered by the July 1971 location of the Mamie placer claim. R 104.

Arno Riefenburg, Regional Attorney, wrote to Milvoy Suchy, Branch Chief, Minerals and Geology, that he questioned the effectiveness of the placer location

notice [2]. But Mr. Riefenburg did not assume to invalidate the placer claim, and his letter did not authorize the impoundment and destruction of Mr. Walker's buildings without an adjudicatory proceeding being had.

Defendants violated Walker's constitutional and statutory rights when, in 1974 and 1975, they destroyed his cabin, power house and tool shed and confiscated and sold his mining equipment and personal property on his placer claim.

The District Court for Oregon had jurisdiction of Walker's suit for damages under 28 USC §§ 1343, 1331 and under 42 USC §1985(3), filed April 5, 1976.

On August 3, 1976, defendants filed a Motion to Dismiss Plaintiff's Complaint

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[2] Mr. Riefenburg's letter of March 11, 1974 states:

"In our opinion the placer location described by Mr. Walker in his notice recorded July 14, 1971, would not be effective to give notice of a claim covering the ground occupied by the invalidated Mamie lode claim. Under these circumstances, Mr. Walker's further occupancy of the ground covered by the invalidated Mamie lode claim in the absence of a permiet from the Forest Service or a valid relocation of the area under the mining laws can be prohibited. We assume you will give Mr. Walker reasonable notice and an opportunity to respond to any request to remove his personal property from the area covered by the invalidated Mamie lode claim."

or in the Alternative for Summary Judgment [R4] on the grounds: (1) "The complaint does not state a valid cause of action under 42 USC 1985. Plaintiff's sole basis for jurisdiction is the alleged violation of his constitutional rights;" [R8], and (2) "The doctrine of official immunity requires dismissal of the complaint." [R9]. "In support of this motion defendants rely upon their affidavits, pertinent portions of the administrative file..."[R 10].

No answer having been filed, Walker filed as a matter of course on October 15, 1976, an Amended Complaint [R 63] and also his Motion for Summary Judgment [R 61], supported by his Affidavit [R 69] and by a Memorandum of Authorities (which memorandum was omitted from the Record on Appeal).

No answer nor any motion for summary judgment was directed by defendants to the Amended Complaint.

The Amended Complaint seeks damages on two counts: (1) for violation of constitutionally protected rights to property and to "Due Process", and (2) under 42 USC §1985(3) for actions outside the scope of lawful duty in furtherance of a conspiracy to deprive plaintiff of his civil rights secured to plaintiff by the Constitution and laws of the United States.

On April 28, 1977, Magistrate Juba filed Findings and Recommendation that defendants motion for summary judgment (filed prior to the Amended Complaint) be granted. [R77, A-7].

The Magistrate's opinion says:

"The validity of plaintiff's placer claim is not in issue here, however. The issue is whether the defendants are immune from this damage suit." [R 77, A-10]. He said further: "Whether or not the Regional Attorney erred is irrelevant for purposes of the immunity of the defendant officials who relied upon his advice. [R 77, A-11].

Judge Belloni allowed defendants' motion for summary judgment and approved the magistrate's recommendation and denied plaintiff's objections to the magistrate's findings [R 88, 89 A-12] He dismissed plaintiff's case. [R 90].

Plaintiff filed a Motion for Amendment of Judgment to vacate and set aside dismissal of plaintiff's case. [R 91]. One of the grounds urged by plaintiff was that defendants' Motion to Dismiss or in the Alternative for Summary Judgment was directed only to plaintiff's original complaint, which had gone out of the case when plaintiff's Amended Complaint was filed under Rule 15(c) F.R.C.P. No motion was directed by defendants to the Amended Complaint. Plaintiff submitted the affidavit of Mr. Lancefield, with exhibits. [R96 to R 107] and supporting memorandum [R 108].

Judge Belloni denied plaintiff's Motion for Amendment of Judgment [R 115, A-12].

The Court of Appeals affirmed June 23, 1978 and denied plaintiff's Petition for Rehearing September 4, 1978. A-1, A-6].

The summary judgment upheld below grants to defendant personnel of the United States Forest Service immunity from a damage action brought by plaintiff, whose buildings they have burned and whose personal property they have confiscated and sold, when so doing was outside the scope of any statutory authority conferred upon the defendants. It is tantamount to a grant of absolute immunity where the official is willing to aver that he acted in good faith.

REASONS FOR ALLOWING THE WRIT

Unless this Court will review and correct the erroneous decision in Walker, the case will make a devastating inroad upon the protection offered by the Fifth Amendment to the Constitution against destruction of a citizen's property by unauthorized action of federal agents, taken without regard to the "Due Process" requirement.

The decision below is an important link in a chain of creeping precedents by which the Forest Service is attempting to enlarge its own authority by self-help and to seize a power,never delegated to the agency by Congress, to drive miners off their mining claims.

If this Court were to allow the lower court's decision in Walker to permit agency employees to decide for themselves that a miner's structures,maintained on his uncontested mining claim, located on federal land open to mineral entry, are in trespass and to proceed to abate such property as an "unauthorized occupancy", without submitting the issue to any adjudicatory proceeding by any authorized tribunal, the "Due Process"

clause will have lost its meaning for a great many citizens.

The lower court's acceptance of defendants' assertions that they were entitled to immunity for action taken within the scope of their official duties ignored resolutely the fact that the action complained of was not within the outer limits of the federal agents' authority to act. The evidence before the court showed plainly that defendants' conduct was a knowing, intentional, assumption of power which the agency does not have, and was a violation of the citizen's right to conduct a lawful business under the mining law by seizing and destroying his property without observance of the citizen's right to an adjudicatory determination whether his occupancy of the placer mining claim was lawful.

The decision below conflicts with this Court's pronouncements in Butz v. Economu, ___U.S. ___, 29 S. Ct. 2984 (June 29, 1978) and cases cited therein, that officials are liable in damages to injured citizens when they stray beyond the plain limits of their statutory authority, and particularly when they violate the fundamental principles of fairness embodied in the Constitution, such as a citizen's right to be protected from confiscation of his property without "Due Process of Law".

In Walker, as in Little v. Barreme, 2 Cranch(6 U.S.) 1970 (1804), and in Bates v. Clark,95 U.S. 204 (1877), cited with approval in Economu, the defendants made seizure "not within the category or type of seizure they were authorized to make". 98 S. Ct. at 2902, 2903.

This Court pointed out in Economu that neither Barr v. Matteo, 360 U.S. 564 (1959) nor Spalding v. Vilas, 161 U.S. 483 (1896) purported to immunize officials who ignore limitations on their authority imposed by law. 29 S. Ct. 2902, 2904.

In Walker, the defendants have no qualified immunity from suit, for that doctrine does not apply where an agent or officer of the Government, purporting to act in its behalf, has acted either beyond the scope of his authority or under authority not validly conferred. United States v. Lee, 106 U.S. 196, 220, 221; Philadelphia Company v. Stimson, 223 U.S. 605, 619; Noble v. Union River Logging R. Co., 147 U.S. 165, 171, 182; Tindal v. Wesley, 167 U.S. 204, 222; Scranton v. Wheeler, 179 U.S. 141, 152; American School of Magnetic Healing v. McAnnulty,197 U.S. 94, 108, 110. In the present case, defendants were no more authorized to confiscate property on plaintiff's placer claim as property of the United States than was the postmaster in McAnnulty authorized to decide for himself that the American School of Magnetic Healing should be denied the use of the mails.

Conscientious performance in good faith of unauthorized action does not excuse violation of constitutional guarantees. The Fifth Circuit said in Nesmith v. Alford, 318 F2d 110 (1963) that when a citizen's First Amendment rights are infringed by a police officer, no matter how much in good faith, such officer is answerable in damages for such interference. The court pointed out that liberty would be at an end if a citizen's exercise of freedom of the

press, freedom of assembly, freedom of speech, and freedom of religion were restricted to what a conscientious policeman in good faith regards the community's threshold of intolerance to be. Similarly here, if the extent of a citizen's rights under a mining claim location are made to depend upon Forest Service employees' opinions as to how their location notices are to be interpreted, then a citizen's investment in improvements and equipment on his mining claim, and his opportunity to conduct a lawful business thereon, would have no protection from the mining laws or the Constitution.

The decision below contradicts Wood v. Strickland, 420 U.S. 308 (1975), which it purports to follow, for the circumstances here did not present either objective nor subjective reasonable grounds for defendants' claim of qualified immunity. The intra-agency correspondence quoted at pages 6-7 above showed the courts below that defendants were aware that they lacked authority to proceed against Walker's property in the absence of any administrative contest or court action against his placer claim.

Defendants were not entitled to construe the Regional Attorney's letter of March 11, 1974, p.8 above, as any authorization to them to impound, burn and sell Walker's property without an adjudicatory proceeding which would first make Walker's maintaining the property on his placer claim unlawful. Defendants are chargeable with knowledge that a regional attorney for Agriculture has no authority to dispense with adjudi-

cation and to decide for himself the extent or validity of a citizen's mining claim, or to take away the right recognized by the mining law [30 USC 612] to maintain structures and occupy the ground for uses incidental to prospecting, mining and processing activities. Strickland offers no immunity for action which knowingly disregards a citizen's constitutional rights, as was done here.

Defendants' liesurely, long-contemplated action here was not entitled to the indulgence discussed in Scheuer v. Rhodes, 416 U.S. 232 (1974) where action must be taken in haste to quell disorder and preserve the peace. This Court said in Economu: "Yet Scheuer and other cases have recognized that it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." 98 S. Ct. at 2911.

The courts below were in error when they granted summary judgment to defendants. Since defendants' excuses offered for their conduct were obviously contrary to long established law and constitutional principles, the case presented a plain issue which required trial.

Walker's affidavit, filed October 15,1976, with his Motion for Summary Judgment and his Amended Complaint, R69-72, is not limited to "conclusory allegations of harassment" as the Court of Appeals says [A-5]. It avers the fact that Walker's placer entry was not adjudicated in any government contest [R71]

and that defendants decided for themselves, without due process as required by the Constitution of the United States or as required by the Administrative Procedure Act, and without authority to make judgment, whether there was in fact an occupancy trespass on his claim. The affidavit avers the fact that defendants proceeded to confiscate and impound Walker's property, converted his personal property, machinery and equipment, burned down the buildings on his claims which were used for prospecting, mining and processing of mineral and purported to sell Walker's property without authority and beyond the scope of any official duties. [R 71]. That affidavit controverts all the self-serving affidavits filed by defendants and raises the issue of fact whether defendants exceeded their authority or acted under an authority not validly conferred. [R 72]. Walker's affidavit also raises the issue whether defendants acted in concert pursuant to conspiracy. [R 71].

Walker should have been allowed opportunity to cross-examine the defendants before their self-serving affidavits were given so much credence by the courts below. In Economu, supra, the opinion joined in by four justices of this Court, who dissented in part and concurred in part, observes that summary judgment on affidavits and the like is inappropriate "when the central, and perhaps the only inquiry is the officials' state of mind. See Wright, Law of Federal Courts, 493 (1976) (it 'is not feasible to resolve on motion for summary judgment cases involving state of mind.') Subin v.

Goldsmith, 224 F2d 753 (CA 2 1955)" 29 S. Ct. at 2921.

CONCLUSION

Inasmuch as the Court of Appeals' decision conflicts with applicable decisions of this Court and would be a serious erosion of the protection to citizens' property and their right to "Due Process" provided in the Fifth Amendment to the Constitution of the United States, this Court should review and correct the erroneous grant of immunity from Walker's suit for damages arising from defendant's exercise of authority not validly conferred on them.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLARD S. WALKER, Plaintiff-Appellant	)
v.	) No, 77-2694
JOHN O. HOFFMAN, RUSSELL B. HALLIDAY, DALE L. FARLEY, MERLE HOFFERBER, W. P. RONAYNE, EDWARD LEWIS, JR., and DOES I through X, Defendants-Appellees.	) MEMORANDUM

[June 23, 1978]

Appeal from the United States District Court for the District of Oregon

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Before : SMITH,* WALLACE and HUG, Circuit Judges

Willard S. Walker appeals from a judgment of the United States District Court for the District of Oregon, Robert C. Belloni, Judge, granting summary judgment for the appellees, employees of the U.S. Forest Service. Walker alleges that the appellees conspired to and did deprive him of his constitutional rights to prospect and mine public domain land open to

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* The Honorable J. Joseph Smith, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

mineral entry, and to maintain structures necessary for such mining. Walker further maintains that the destruction of his cabin and confiscation of his personal property were unlawful, exceeding the authority of the forestry officials. Accordingly, he seeks monetary damages pursuant to rights granted by the fifth amendment to the U.S. Constitution and 42 U.S.C.§1985(3).

The district court adopted the findings of the United States Magistrate, who determined that the appellees' claim of qualified immunity was supported by substantial undisputed evidence. We concur with these findings of fact and law, and affirm the district court's grant of summary judgment for the appellees.

Facts

Appellant Walker was the claimant of a mining lode claim on U.S. Forest Service lands. In an attempt to eliminate unauthorized use of such property, the Forest Service conducted mineral examinations of the claim during the years 1967-68, finding that the claim was being used improperly as a summer home, and not for mining. The appellant was notified of this finding and was offered a "special use" permit which authorized temporary occupancy of the cabin located on the claim site.

In 1970, the Department of the Interior formally contested the validity of appellant's claim. Appellant failed to answer the Department's complaint, and the mining claim was declared null and void by the Bureau of Land Management.

The appellant did not appeal, and the decision became final on April 1, 1971.

Appellant then recorded a "placer claim", which covered approximately the same territory as the previously invalidated lode claim. A number of structures, including a cabin and tool shed stood on this property.

Following the April 1 decision by the Bureau of Land Management, the Forest Service maintained that the presence of the appellant's cabin and personal property on the claim site was unlawful under the terms of 36 C.F.R. §261.11. It moved to eliminate these structures following procedures mandated by the Forest Service Manual §2811.52. In December, 1972, the appellant was ordered to remove the disputed structures and other property by May 1, 1973. Notice of intention to impound property pursuant to 36 C.F.R. §261.16(c) was delivered to Appellant on October 2, 1973.

The appellant did not remove his property, nor did he accept the special use permit offered by the Forest Service. Following the receipt of advice from the Regional Attorney that appellant's placer claim did not authorize continued occupancy of the disputed site, forestry officials confiscated and sold appellant's personal property, and burned his cabin and sheds. This civil rights action followed.

Discussion

In reviewing the district court's grant of summary judgment for the appel-

lees, we must determine whether the parties presented any triable issues of fact and, if no such issues exist, whether the appellees were entitled to a judgment as a matter of law. Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F2d 620 (9th Cir. 1977); 6 Moore's Federal Practice, ¶¶56.04[1], 56.15[1].

In the instant action forestry officials argue that they are entitled to prevail by virtue of the qualified immunity established in Scheuer v. Rhodes, 416 U.S. 232 (1974) and explicated in Wood v. Strickland,420 U.S. 308 (1975). This court has indicated that "a government officer performing acts in the course of official conduct is insulated from damage suits only if (1) at the time and in light of all the circumstances there existed reasonable grounds for the belief that the action was appropriate and (2) the officer acted in good faith." Midwest Growers Co-op v. Kirkemo, 533 F2d 455 (9th Cir. 1976); Mark v. Groff, 521 F2d 1376 (9th Cir. 1975).

The standard here is both objective and subjective. In order to qualify for immunity, an officer must have reasonable objective grounds for thinking his actions lawful, and must act subjectively in good faith. In the case at bar, forestry officials submitted affidavits and supporting documents which demonstrate that they followed normal procedures in terminating the appellant's occupancy of the claim site. The lode claim was declared invalid after a proceeding before the Bureau of Land Management, and appellees consulted the Regional Attorney to determine the legal effect of the appellant's

notice of placer claim. In short, the appellees have demonstrated both that they had reasonable ground for believing their actions to be lawful, and that they acted in good faith.

In his amended complaint and accompanying affidavit, the appellant does aver that he was "harassed by forestry officials. [App. at 65, 70]. But this amounts to nothing more than an unsupported conclusory allegation insufficient to generate a "genuine issue" as to the good faith of the appellees.

The non-movant has an affirmative duty to come forward to meet a properly supported motion for summary judgment.

> A party opposing a motion for summary judgment simply cannot make a secret of his evidence until the trial, for in doing so he risks the possibility that there will be no trial. A summary judgment motion is intended to "smoke out" the facts so that the judge can decide if anything remains to be tried. [Donnelly v. Guion, 467 F2d 290, 293 (2d Cir. 1972)].

See also, Mutual Fund Investors, Inc. v. Putnam Management Co., supra, 553 F2d at 624-24; ALW. Inc. v. United Air Lines, 510 F2d 52 (9th Cir. 1975); 6 Moore's Federal Practice ¶56.15[2]; 10 Wright & Miller, Federal Practice and Procedure §2739. The appellant has failed to meet this requirement.

The appellees have satisfied their burden of demonstrating that there is no genuine issue of fact disputed in this case, and summary judgment was therefore appropriately granted.

Affirmd.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLARD WALKER, Plaintiff-Appellant, -vs- JOHN O. HOFFMAN, RUSSELL B. HALLIDAY, DALE L. FARLEY, MERLE HOFFERBER, W. P. RONAYNE, EDWARD LEWIS, JR., and DOES I through X, Defendants-Appellees.	)	No. 77-2694 ORDER Filed Sept. 14, 1978

Before: SMITH,* WALLACE and HUG, Circuit Judges

Appellant's Petition for Rehearing is denied.

* Honorable J. Joseph Smith, Senior United States Circuit Judge, Second Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

WILLARD S. WALKER, Plaintiff, v. JOHN O. HOFFMAN, RUSSELL B. HALLIDAY, DALE L. FARLEY, MEREL HOFFERBER, W. P. RONAYNE, EDWARD LEWIS, JR., and DOES I through X, Defendants.	)	Civil No. 76-320 FINDINGS and RECOMMENDATION

Plaintiff brings this action against six defendants (all personnel of the Forest Service) alleging that defendants conspired and deprived plaintiff of privileges and rights secured by the Constitution. Specifically plaintiff complains that defendants denied him the right to prospect and mine land open to mineral entry and build and maintain structures and personal property incidental to mining such land. He further complains that his cabin and personal property on the land were seized and destroyed by defendants. Jurisdiction is based on 28 USC §§ 1331, 1343.

Plaintiff was the claimant of a mining claim in Josephine County known as the Mamie Lode Claim. The Forest Service has been making an effort in recent years to investigate mining claims in an attempt to identify possible unauthorized uses of forest land. Plaintiff's claim was investigated in the years 1967-1969. The mineral engineer

determined that there was no discovery of valuable minerals. Plaintiff was notified of the investigation and offered a special use permit.[1]

In 1970 the Forest Service filed a complaint with the Department of Interior to contest the validity of plaintiff's lode claim. Plaintiff failed to answer the complaint. The mining claim was declared null and void. Plaintiff did not appeal, and the decision became final on April 1, 1971.

After this decision, it was defendant's position that the presence of plaintiff's cabin and property on the void claim constituted an unauthorized trespass on forest land pursuant to C.F.R. §261.11. The Forest Service Manual §2811.52 sets out procedures for the removal of these unauthorized structures. This procedure was followed. In December 1972 defendants notified plaintiff to remove the cabin by May 1, 1973. Plaintiff did not comply. Plaintiff in the meantime had filed anotice of a placer claim as opposed to the lode claim that had been declared void. The defendants asked the Regional Attorney of the Forest Service whether this new notice would constitute a valid mining claim on the ground previously occupied

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1. There was a cabin located on the claim. A special use permit is designed to allow the occupier of the cabin a certain amount of time to continue occupancy in order to recoup his losses.

by the lode claim. The Regional Attorney advised that it would not.

On October 2, 1973, defendants delivered to plaintiff a notice of intent to impound the structure pursuant to 36 C.F.R. §261.16(c). Plaintiff failed to respond to this notice and subsequent notice. The structures and personal property were confiscated in September 1974. The cabins were subsequently burned, and the personal property was sold. On April 5, 1976, plaintiff filed this action.

Defendants have moved for summary judgment on the basis of immunity. While defendants do not have absolute immunity, a qualified immunity is available. Scheuer v. Rhodes, 416 U.S. 232 (1974). Under the qualified immunity doctrine, the officer or employee who is performing acts in the course of official conduct is insulated from damage suits if 1) at the time and in light of all the circumstances there existed reasonable grounds for the belief that the action was appropriate and 2) the officer or employee acted in good faith. Midwest Growers Co-op v. Kirkemo, 533 F2d 455, 463 (9th Cir. 1976); Mark v. Groff, 521 F2d 1376, 1379-80 (9th Cir. 1975).

The Supreme Court restricted this standard recently in Wood v. Strickland, 420 U.S. 308 (1975). There the Court remanded a Civil Rights action against school board officials, saying:

> The disagrrement...over the immunity standard in this case has been put in terms of an "ob-

> jective versus a "subjective" test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. 420 U.S. at 321.

The thrust of plaintiff's argument is that the Forest Service, under the Department of Agriculture, does not have authority to declare claims null and void. The Department of Interior is charged with seeing that invalid claims are eliminated. See Palmer v. Dredge, 398 F2d 791, 792 (9th Cir. 1968). Thus, the Forest Service has no authority to declare the plaintiff's placer claim invalid.

The validity of plaintiff's placer claim is not in issue here, however. The issue is whether the defendants are immune from this damage suit.

The defendants have submitted affidavits attesting to their good faith belief that their actions were legal and proper. Even assuming that the "knew of should have known" standard of Wood v. Strickland, supra, applies to these Forest Service personnel, there is nothing in the record to indicate they had reason to know that their conduct was not legal. As noted above, the defendants consulted the Regional Attorney on

the validity of the subsequent placer claim location notice. The defendants were advised by the Regional Attorney that the notice would not be effective to give notice of a claim covering the same ground occupied by the lode claim that had been declared void. Whether or not the Regional Attorney erred is irrelevant for purposes of the immunity of the defendant officials who relied upon his advice.

Accordingly, I find that there is no genuine issue of material fact in dispute as to the defendants' good faith and reasonable belief in the appropriatness of their conduct. Under such circumstances, there is no need to require defendants to face an expensive, unnecessary trial. Economou v. United States Dept. of Agriculture, 533 F2d 688, 696 (2d Cir. 1976). Defendants' motion for summary judgment should be granted.

Dated this 27 day of April, 1977.

/s/ George E. Juba
United States Magistrate

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

WILLARD S. WALKER,	)	
	)	CIVIL NO.
Plaintiff,	)	76-320
	)	
vs.	)	ORDER
	)	
JOHN O. HOFFMAN, RUSSELL B. HALLIDAY, DALE L. FARLEY, MERLE HOFFERBER, W. P. RONAYNE, EDWARD LEWIS, JR., and DOES I through X,	)	
	)	
Defendants.	)	

In this civil rights action against federal government officials, Judge Juba recommended granting the defendants' motion for summary judgment on the basis of qualified immunity. I followed that recommendation. Thereafter, plaintiff untimely filed objections which I considered, and I again had an order entered which granted defendants' motion for summary judgment. Now, plaintiff moves to amend the judgment.

Many issues previously considered are raised again by plaintiff. A minimum of attention, however, is paid to the only relevant question at this juncture of this action--the defendants' good faith and reasonable belief.

Summary judgment must stand. Defendants had the right to make the motion and test plaintiff's case. He presented no material facts which countered the defendants' immunity, but instead relied upon the allegations of the complaint.

The Federal Rules of Civil Procedure do not allow this tactic. Fed. R. Civ. P. 56(e); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Smith v. Mack Trucks, Inc., 505 F2d 1248 (9th Cir. 1974).

IT IS ORDERED that plaintiff's motion for amendment of judgment is denied.

Dated this 29 day of June, 1977.

/s/ Robert E. Belloni,
United States District Judge

Supreme Court, U. S.
FILED
JAN 2 1979
JR., CLERK

No. 78-724

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLARD S. WALKER, PETITIONER

v.

JOHN O. HOFFMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the district court erroneously granted summary judgment in favor of the respondents—six employees of the United States Forest Service who seized or destroyed petitioner's tools and structure on his putative mining claim after they warned him twice that they would take such action unless he removed them himself.

The affidavits filed in the district court showed that the six employees acted on the basis of advice

of the Regional Attorney of the Forest Service that petitioner had no lawful right to maintain his house and property on Forest Service lands (Pet. 8 n.2). Accordingly, under the holding of *Butz* v. *Economou*, No. 76-709 (June 29, 1978), slip op. 6-17, 25-29, respondents were entitled to summary judgment, on the basis of a qualified immunity, unless there was evidence tending to show that respondents knew or believed that petitioner had a valid right to maintain his house and property on the land. Petitioner, however, refers to no such evidence. The inter-agency correspondence referred to by petitioner (Pet. 6-7) indicates at best that the Forest Service had questions about the legality of petitioner's mining claim. Accordingly, they sought the advice of the Regional Attorney. In reliance on the advice, they gave petitioner notice to remove his property in accordance with procedures for the removal of unauthorized property set forth in the Forest Service Manual (Pet. App. A-8). When petitioner failed to do so, respondents removed the property from Forest Service lands as allowed by those procedures. Nothing in the correspondence quoted by petitioner suggests that after receipt of the Regional Attorney's advice respondents knew or should have known that petitioner had a valid right to maintain his property on Forest Service land. Summary judgment was therefore properly granted.

Petitioner argues (Pet. 16) that he should have been allowed to cross-examine respondents about their knowledge and belief. He does not contend,

however, that he invoked, much less that the district court improperly denied, the procedure of Fed. R. Civ. P. 56(f), which permits a court to postpone ruling on a summary judgment motion in order to allow discovery of the type petitioner mentions.[1] Absent any such claim, Rule 56 makes it quite clear that a summary judgment motion may not be denied merely because the party opposing it hopes to develop evidentiary leads at trial or later proceedings; rather, Rule 56 requires the district court, as it observed (Pet. App. A-12 to A-13), to determine if there are genuine issues of material fact based on the summary judgment record before the court. Here, the district court and the court of appeals held that the summary judgment record presented no genuine issue of material fact concerning respondents' immunity. There is no need for this Court to review that essentially factual conclusion, concurred in by two lower courts. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

The courts below correctly followed the suggestion of this Court in *Butz* v. *Economou*, *supra*, slip op. 28-29, that "damage suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary

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[1] Petitioner made untimely objections (see Pet. App. A-12) to the summary judgment, but those objections did not contend that he was entitled to cross-examine respondents or request discovery concerning their knowledge or beliefs. See Plaintiff's Objections to Magistrate's Finding and Recommendation and Motion for Supplemental Findings and Conclusions, filed May 16, 1977, in the district court.

judgment based on the defense of immunity," and that "[i]n responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

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